



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 144 of 2003**

Civil Case 144 of 2003

JOHN SILAS LENANA PULEIYPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT

JUDGMENT

The plaintiff amended the plaint and filed the same on 22/1/2007. The plaintiff's claim against the defendant arises out of a transaction of borrower (plaintiff) and lender (defendant) whereby the plaintiff borrowed some money and the debt was secured by a charge over plaintiff's property.

The plaintiff pleads that the defendant overcharged and received more money than it was entitled to under the charge. Defendant charged interest contrary to provisions of Section 44 Banking Act, Central Bank of Kenya Amendment Act 2000 and the auction of his property was irregular, unlawful, wrongful and calculated to clog the chargors right of redemption and the plaintiff has suffered loss and damage as particularized in the plaint all amounting to Kshs.5,938,849/60 and the plaintiff claims Kshs.5,938,494/60 plus general damages, interest and costs.

The defendant filed an amended defence and counter claim. It is admitted by defence that by 30/9/2002 the outstanding amount was Kshs.4,746,115/21 and not Kshs.120,984/57. It is denied that:-

1. *The auction was irregular;*
2. *That the suit property was valued at Kshs.1,839,280/=;*
3. *That the balance contractually due was Kshs.120,984/57;*
4. *That the plaintiff paid any professional fees as claimed;*
5. *Charges contrary to Banking Act Section 44 are denied.*

Thereafter the defendant counter-claims for Kshs.4,775,503/30 the

amount continuing to accrue and unpaid with interest at the rate of 19.9% from 9/4/2003 until payment in full. This claim is denied, Kshs.600,000/= is said to be in excess of contractual debt and the property was grossly undersold.

The parties called evidence and filed written submissions. PW1 is a blind man. He is the plaintiff. He testified that it is true he borrowed money in 1991 and 1993 to enable him to build a 2 storey building. He repaid the money except for a few occasions when he did not pay because of difficulties.

However, he heard that his property was sold on 25/1/2002. On 30/9/2002 he had paid defendant a total of Kshs.1,636,956/35. He said the selling value of Kshs.600,000/= was undervalue.

He testified that default charges, penalty, interest and other interests were not part of contractual charges which amounted to Kshs.4,625,130/64. He said it was the defendant who owed him Kshs.5,938,494/60. An expert and qualified accountant gave evidence and stated the defendant had charged Kshs.63,681/10 contrary to Section 44 of the Banking Act and he concluded that the account had been overcharged by the sum of Kshs.3,726,377/77 as at 30/9/2002.

For defendant evidence was given by Ms. Njoroge, Legal Officer who said that the charge document provided for variation of interest charged on the loan. She admitted that penalty, interest and default charges were not specifically provided for in the charge. She also confirmed that the property was sold on 25/1/2002 at Kshs.600,000/=. The plaintiff proposed issues to be determined thus:-

1. *Whether the defendant was justified to levy default charges and penalty interests and to increase the interest chargeable;*
2. *Whether equity of redemption was clogged by the defendant's action;*
3. *Whether sale was irregular and whether the property was undersold;*
4. *Whether the defendant is entitled to prayers in the counter-claim;*
5. *Whether plaintiff is entitled to prayers in the plaint.*

On the issue of interest, penalty interest and/or default charges, an

examination of "PEXh.4" shows that in the year 1998, the plaintiff was charged monthly interest, edger fees, fire insurance, life insurance, auctioneers charges for every month, legal/professional fees.

The basic information is to be found in offers of advance dated 23/1/91 Kshs.405,000/= and further offer dated 21/2/93 Kshs.135,000/= both at the interest of 18% per annum and legal charge documents 12/3/91 and further charge dated 17/3/93 and correspondence with the bank. Both offers are for a period of 25 years. Repayments were Kshs.1,843,677/38 and Kshs.614,559/13 respectively but the repayments were altered by the variation of the rate of interest from time to time.

In addition to the terms stated in the charge documents and letters of offer, this contract of lending is controlled by the Banking Act, Central Bank Act. The Central Bank of Kenya Amendment Act stipulates the maximum rate of interest to be 19% as stated under Section 39 thereof. This Section was amended up to 17/4/1997. In terms of Section 44 the Banking Act charges amounting to Kshs.63,681/10 were not sanctioned without consent of Finance Minister.

There is no evidence that such approval was obtained in this matter. Also "other charges" amounting to Kshs.120,190/85 are not proved. They are charged on 30/4/2000, 30/11/2001, 31/12/2001, 31/3/2002 and 31/8.2002. The defendant's outstanding balance on 30/9/2002 of Kshs.4,746,115/21 recalculated as above, it is reduced to a debit of Kshs.1,019,737/44. This method of calculating the mortgage account is the correct one in terms of charge. Clause 7 and 8 of the charges specifies what would be levied as other charges.

There is evidence that the defendant did give indulgence to the plaintiff from time when the plaintiff had difficulties in making payments. Clause 12 (III) stated:-

"It is hereby agreed and declared it shall be lawful for the company from time to time at the request of the borrower to accept payment of moneys due or becoming due hereunder by such increased or reduced installments as shall from time to time be agreed or to agree to suspend payment of moneys due or becoming due hereunder to grant such indulgences as may from time to time be agreed."

There is evidence that the defendant has complied with this provision from time to time as exhibited by letters produced by the defendant. The plaintiff relies on the case of Givan Okallo Ingari & another vs. HFCK (eKLR) 2007 where the court held:-

“That the charge document in its entirety does not provide for default charges that was levied on the account of the applicants.”

Furthermore, in its defence, the defendant stated that the default charges and penalty interest together with interest on the same had been levied as a result of custom and usage in the mortgage industry in Kenya. No evidence of such custom was proved and no such custom and usage can be allowed to breach a contract.

In the above mentioned case, the court clearly stated:-

“Prevailing custom or trade usage could not be a basis for allowing the defendant to commit acts of fundamental breach to contractual document then charges debited in the plaintiff’s account were done without legal basis and therefore made the account irredeemable.”

On the issue of “other charges” evidence was given by Mr. Onono, showed that these are not payable. Furthermore, the rate of interest was fixed at 18% p.m. unless notice of variation is served upon the plaintiff of a period of 4 months. There is no evidence that such notice was given either in terms of first charge or the further charge. The defendant’s valuation evidence shows different amounts. The sale was at Kshs.600,000/=.

The plaintiff’s valuer and witness clearly stated that at 30/9/2002 valuation was Kshs.1,839,280/= and that by 25/1/2002 the price of Kshs.600,000/= was greatly undervalued. There is a variation in the valuations relied on by the defendant. Valuation of 15/12/1992 showed valuation was Kshs.600,000/= and on 18/7/2000 reserve price was Kshs.700,000/= and on 10/11/2001 recommended reserve price of Kshs.600,000/=. These valuations are not consistent and are unreliable.

Mr. Kahonge’s evidence which is consistent and firm showed that immovable property hardly depreciates and he did physically value the property and found the value to be Kshs.1,839,280/= in 2002. The plaintiff relies on the decision in the case of Mbuthia vs. Jimba Credit Finance Corporation & another [1988] KLR 1 the court held:-

“If a mortgagee enters into possession and realizes a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit.”

The circumstances of this case is that the defendant seeking the outstanding loan was Kshs.4,775,503/20 he could not possibly have allowed a sale in the price of Kshs.600,000/=. The same was in the case of Kenya Commercial Bank Ltd. vs. Osebe [1982] KLR 296 “a mortgagee” in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell.

Moreover, the purported notices were not served. The plaintiff is a blind man and he could not write his signature as the affidavit of service states. On the issue of the defendant’s counter-claim and considering what is stated above the defendants counter-claim is baseless and unsupported by law. The contract of lending between the plaintiff and defendant terminated when the security was realized by sale and the defendant has no claim against the plaintiff. The counter-claim is therefore dismissed with costs to the plaintiff.

Regarding the plaintiff’s claim as prayed in the plaint. It is trite law that no general damages are awarded in cases of contract, therefore the prayer is not awarded. On prayer 9, the plaintiff has demonstrated that he was overcharged unlawfully and lost the sum claimed amounting to Kshs.5,938,494/60.

I am satisfied that the plaintiff has proved his claim on a balance of probability and I enter judgment against defendant in the said sum plus interest at court rates from the date of filing suit. The plaintiff is also awarded costs of this suit.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of October 2009.

JOYCE N. KHAMINWA

JUDGE